

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayner
Marshall Johnson
Ken Nickolai
Phyllis A. Reha
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of an Investigation into Aquila,
Inc.'s Sale of Its Shipper Services

ISSUE DATE: November 21, 2003

DOCKET NO. G-007,011/CI-03-277

ORDER FINDING JURISDICTION AND
REQUIRING AQUILA TO REQUEST
APPROVAL OF THE SALE OF ITS SHIPPER
SERVICES OPERATIONS

PROCEDURAL HISTORY

On March 21, 2003, the Commission issued its ORDER APPROVING WITHDRAWAL OF COMPLAINT AND OPENING TWO NEW DOCKETS.¹ This Order allowed Pro-Corn LLC to withdraw the complaint it had filed against Aquila, Inc. (Aquila) on September 25, 2002 and required Aquila, among other things, to show cause within 30 days of the Order why the sale of its gas merchant business to Cornerstone Energy, Inc. (Cornerstone) is not subject to regulatory review.²

On April 21, 2003, Aquila filed its comments in response to the Commission's show cause directive.

On April 25, 2003, the Commission requested potentially interested persons to comment on two issues: 1) whether the Commission has jurisdiction over this transaction, and if so, what action is recommended and why? and 2) if the Commission does not have jurisdiction over this transaction, are there steps that should be taken (e.g. safeguards regarding the use of Aquila assets and the provision of Aquila services, tariff modifications, retail market rules, etc.) to protect Minnesota ratepayers and the public interest from the unique terms of Aquila's contract with Cornerstone?

¹ In Docket No. G-007,011/C-02-1602, *In the Matter of the Complaint of Pro-Corn, LLC Against Aquila, Inc. (Formerly UtiliCorp United Inc.)*. Reconsideration denied May 30, 2003.

² Cornerstone Energy Inc. is a natural gas marketing company owned and operated by five former employees of Aquila's Shipper Services program. Aquila's sale of its Shipper Services business to Cornerstone closed on or about September 30, 2002.

On May 30, 2003, Bemidji State University submitted comments.

On June 5, 2003, the Department of Commerce (DOC) filed comments and Cornerstone filed a petition to intervene and initial comments.

On June 20, 2003, Aquila, Cornerstone and the DOC filed reply comments.

On July 23, 2003, the DOC filed its response to reply comments.

This matter came before the Commission on November 6, 2003.

FINDINGS AND CONCLUSIONS

I. Background and the Transfer

Aquila provides regulated natural gas service in Minnesota through its operating divisions, Aquila Networks-PNG (PNG) and Aquila Networks-NMU (NMU). Prior to the sale of its Shipper Services³ business, Aquila operated its Shipper Services business on an integrated basis with its regulated utility operations.

On or about September 30, 2002, Aquila sold its Shipper Services business to Cornerstone.⁴ This transaction was accomplished by Aquila transferring the assets of its Shipper Services business to Energy One Ventures (EOV), a limited partnership controlled by Aquila, followed by the merger of EOV into Cornerstone. The assets transferred by Aquila to EOV, and subsequently to Cornerstone, included Aquila's contracts with its Shipper Services customers, the pipeline transportation contracts used for the delivery of Shipper Services, and storage capacity contracts.

II. Positions of the Parties

A. DOC

The DOC argued that the Commission has authority to review and approve Aquila's asset transfers to EOV and, ultimately, to Cornerstone pursuant to Minn. Stat. § 216B.48 (Affiliated Interest Statute) and 216B.50 (Property Transfer Statute). It argued that Aquila has not shown that the Commission lacks jurisdiction to approve the transfers at issue.

³ Shipper Services is the name Aquila used in Minnesota for its non-regulated agency services business.

⁴ Cornerstone was formed by former mid-level managers of Aquila's Shipper Services business.

The DOC argued that Aquila was a public utility providing regulated natural gas service through its operating divisions Aquila Networks-PNG (PNG) and Aquila Networks-NMU (NMU). It further argued that EOV, a limited partnership controlled by Aquila, was an affiliated interest of Aquila under Minn. Stat. § 216B.48, subd. 1(9). This statute includes in the definition of an affiliated interest “every part of a corporation in which an operating division is a public utility.”

The DOC argued that since the transfer between Aquila and EOV was a transfer between a public utility and an affiliated interest, the transfer was subject to Commission approval under the Affiliated Interest Statute. In response to Aquila’s argument that the transfers herein were of assets used for non-regulated operations, the DOC argued that the statute makes no distinction with respect to regulated or non-regulated services and operations. Further, the DOC argued that the subsequent transfer of the property to Cornerstone does not eliminate Aquila’s obligation to secure Commission approval for the transfer from Aquila to EOV under the Affiliated Interest Statute.

The DOC also argued that the sale of Aquila’s Shipper Services business was subject to prior Commission approval under the Property Transfer Statute. It argued that this statute would apply to the sale of unregulated utility property as well as regulated utility property. In this case, the DOC argued that Aquila’s Shipper Services operations were integrated with Aquila’s regulated utility operations. Further, Aquila sold to Cornerstone pipeline capacity and storage rights that were previously identified, at least in part, as entitlements of Aquila’s utility customers.

The DOC recommended that the Commission require Aquila to request approval of the sale of its Shipper Services businesses and the transfer of property from Aquila to EOV and Cornerstone.

B. Aquila

Aquila argued that the approval provisions of the Affiliated Interest Statute do not apply to the transaction herein because this was not a transaction by a public utility and the transaction was not with an affiliate.

It argued that a corporation (Aquila) that includes a public utility within its operations is not acting as a public utility when it offers unregulated agency services and, therefore, the sale of the unregulated services business was not a sale by a public utility.

Further, it argued that Cornerstone was not an affiliate. Therefore, the statute did not apply. It argued that in order for Cornerstone to be an affiliate of Aquila under § 216B.48, there must be some ownership or other control by Aquila over Cornerstone, or by Cornerstone over Aquila. Since there were no overlapping directors, shareholders, officers, employees or assets, nor was there any control by Aquila over Cornerstone, or vice versa, the statute did not apply.

In response to the DOC’s argument that the transfer of the unregulated Shipper Services contracts from PNG to EOV was an affiliated transaction, Aquila argued that in order to simplify the sale of Shipper Services to Cornerstone, it first transferred unregulated contracts into EOV, and then EOV was merged into Cornerstone.

Finally, Aquila argued that Commission approval required by § 216B.48 is for “regulatory purposes” and until approval is received a utility cannot reflect an affiliate transaction in its rates. It stated that in the current situation the unregulated Shipper Services contracts were not subject to Commission jurisdiction, were not included in the base rate, and the expenses related to implementing the contracts were not included in rates. It argued that for this reason the transfer of the unregulated Shipper Services contracts from PNG to EOV had no impact on rates. Since the transfer of the unregulated Shipper Services contracts from PNG to EOV had no impact on rates, declaring the transfer void for “regulatory purposes” would have no effect.

Aquila also argued that Minn. Stat. § 216B.50 (that public utilities may not sell utility operating property without Commission approval) does not apply to the merger of EOV into Cornerstone because it was the merger of non-utility property (Shipper Services).

It argued that none of the PNG or NMU utility operating units or systems were sold to Cornerstone nor were any pipes, meters, other distribution assets, real property, or personal property used by PNG or NMU acquired by Cornerstone. The only assets acquired by Cornerstone were Aquila’s Shipper Services customer contracts, the pipeline transportation contracts used in the delivery of Shipper Services, and a third-party storage contract.

C. Cornerstone

Cornerstone argued that its purchase of EOV cannot be considered an affiliate transaction under Minn. Stat. § 216B.48 since Cornerstone was not and is not an affiliate of Aquila.

Cornerstone argued that even though some of the assets involved in this transaction could be viewed as having been integrated at one point with other Aquila assets, Cornerstone purchased only non-regulated assets and did not purchase any regulated utility plant operating assets. It argued that nothing about this purchase impacted Aquila’s regulated operations.

D. Bemidji State University

Bemidji indicated that it was a long time transportation customer on the Aquila system and currently purchases natural gas supplies and related services from Cornerstone. It argued that the Minnesota ratepayer will benefit from this transaction in that Aquila is no longer subsidizing its own non-regulated business with ratepayer assets.

III. Commission Action

The Commission finds that it has jurisdiction under Minn. Stat. § 216B.48 over Aquila’s sale of its Shipper Services operations via Aquila’s transfer of assets to EOV. Since the Commission has jurisdiction under this statute, the Commission need not reach the issue of whether it also has jurisdiction under Minn. Stat. § 216B.50.

In this case Aquila is a public utility. It provides regulated natural gas service in Minnesota through its operating divisions, PNG and NMU. Aquila's argument that it was not acting as a public utility when it offered unregulated agency services (such as Shipper Services), and therefore the sale of this business was not the sale by a public utility of assets subject to the Affiliated Interest Statute is not persuasive.

Further, the Commission finds that the record supports, and Aquila acknowledges, that Aquila operated its Shipper Services business on an integrated basis with its regulated utility operations. It used utility assets to serve both its regulated and its unregulated operations. Clearly, when there is this integration, the Commission has the necessary authority to examine this transaction.

The Commission also finds that EOV is an affiliated interest of Aquila in that it is a limited partnership controlled by Aquila.

For the above reasons, the Commission finds that it has the authority to review Aquila's transfer of its Shipper Services assets to EOV under Minn. Stat. § 216B.48.

The Commission recognizes that the pre-approval requirement of Minn. Stat. 216B.48 is, through Commission Order,⁵ limited to regulatory concerns. However, this limitation does not relieve Aquila from its obligation to file the affiliated interest transaction between Aquila and EOV subject to this statute. Therefore, the Commission will direct Aquila to request approval of the sale of its Shipper Services operations from Aquila to EOV within 60 days of the date of this Order.

In its request for approval the Commission will require Aquila to demonstrate that:

the transfer and sale did not strand Minnesota ratepayers with unnecessary costs;

the transfer and sale did not affect regulated service or reliability by disposing of assets that are necessary for utility operations;

the transfer and sale did not otherwise negatively impact the remaining unsold portion of Aquila and/or its Minnesota regulated customers.

Finally, the Commission notes Aquila's agreement to cooperate and provide financial information that may be requested by the DOC in order to facilitate the review of this transaction for regulatory concerns.

⁵ ORDER INITIATING REPEAL OF RULE, GRANTING GENERIC VARIANCE, AND CLARIFYING INTERNAL OPERATING PROCEDURES in Docket No.E,G-999/CI-98-651, *In the Matter of a Commission Investigation into Procedures for Reviewing Public Utility Affiliated Interest Contracts and Arrangements*, September 14, 1998.

ORDER

1. Aquila shall request approval of the sale of its Shipper Services operations and the transfer of property and information from Aquila to EOV within 60 days from the date of this Order.
2. Aquila shall demonstrate the following in its request for approval:
 - the transfer and sale did not strand Minnesota ratepayers with unnecessary costs;
 - the transfer and sale did not affect regulated service or reliability by disposing of assets that are necessary for utility operations; and
 - the transfer and sale did not otherwise negatively impact the remaining unsold portion of Aquila and/or its Minnesota regulated customers.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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